IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE SHORENSTEIN HAYS-NEDERLANDER THEATRES LLC APPEALS	)	Nos. 596, 2018 and 620, 2018 CONSOLIDATED On Appeal from the Court of Chancery of the State of Delaware C.A. Nos. 9380-VCMR and 2018-0701-TMR

APPELLEES' ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANTS' OPENING BRIEF ON CROSS-APPEAL

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PRELIMINARY STATEMENT

This case is a dispute about control over a live performance theater located in San Francisco, California—the Curran Theatre (the "Curran"). For more than 30 years, the Curran was operated by Shorenstein Hays-Nederlander Theatres LLC ("SHN") and its predecessor partnership pursuant to a written lease that expired on December 31, 2014. SHN is and has always been owned by two 50-50 Members: (i) Appellant Nederlander of San Francisco Associates ("NSF"), a partnership controlled by Robert E. Nederlander, and (ii) Appellee CSH Theatres LLC ("CSH Theatres"), an LLC controlled by a trust of which Appellee Carole Shorenstein Hays is a beneficiary. In 2000, the two Members, NSF and CSH Theatres, entered into a Plan of Conversion and Operating Agreement (the "LLC Agreement") with respect to SHN.

The following key facts are not in dispute: In 2009 and 2010, SHN had the opportunity to purchase the Curran from its then-owner, but Mr. Nederlander refused the purchase because he thought the asking price was too high.[1] Instead, with Robert Nederlander's express consent, Carole Hays purchased the Curran (through Appellee CSH Curran LLC) in December 2010 for her own

[1] Robert E. Nederlander is referred to hereafter as "Mr. Nederlander" or "Robert Nederlander."

account and thereby became the lessor.[2] In 2012 and 2013 (well prior to the December 31, 2014 expiration of SHN's lease), the parties attempted to negotiate a new lease, but were far apart on the two most important terms—rent and duration. Negotiations ended with no deal after a January 2014 meeting of the SHN Board of Directors.

This case began shortly thereafter when NSF made an assertion—never previously mentioned or even hinted at—that during a telephone call four years earlier (in 2010), Carole Hays had made a binding oral promise to lease the Curran to SHN in perpetuity at an unspecified rent after expiration of the prior lease. NSF also then claimed for the first time that the LLC Agreement precluded Mrs. Hays and any entity affiliated with her from operating the Curran independently of SHN.

Specifically, NSF pointed to Section 7.02(b) of the LLC Agreement, which prohibits the "Nederlander Entity" and the "Shorenstein Entity"—the two Members of SHN—from staging a production that either entity "controls" within 100 miles of San Francisco unless one of three conditions is met—(1) the production first plays in an SHN theater, (2) the "other Member" rejects the production for SHN or (3) SHN shares in the profits pursuant to an agreement.

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[2] CSH Curran LLC is referred to herein as "CSH Curran."

(A305.) "Control" is defined in the LLC Agreement to mean "the ability to determine where the Production plays and the terms and conditions of said engagement." (A305.) NSF argued that "Nederlander Entity" and "Shorenstein Entity" mean not just the two Members of SHN, but also all "Permitted Transferees" of their membership interests—including all Affiliates of the Members—even though no transfer of membership interests has ever taken place. This claim was made even though members of the Nederlander family (all of whom are "Permitted Transferees") had for years competed with SHN within 100 miles of San Francisco without ever complying with Section 7.02. NSF also argued that "both producers *and* theater operators have control over" any production booked into the Curran simply by agreeing for the show to be staged there. (A622 (NSF Sept. 20, 2017 Pre-Trial Answering Brief 18) (emphasis in original).)

At trial in 2017, NSF's case crumbled. Mr. Nederlander, NSF's principal, admitted on the witness stand that he and Mrs. Hays never agreed to the rent or duration of any lease, compelling the trial court to reject the claim of a 2010 "oral lease" in a lengthy post-trial opinion. NSF does not appeal that ruling. With two limited exceptions also not at issue here, the trial court also rejected the remainder of NSF's breach of fiduciary duty and breach of contract claims. On the claim alleging improper competition under Section 7.02(b), the trial court adopted

NSF's incorrect interpretation of "Shorenstein Entity," but nevertheless rejected NSF's claim that Appellees' operation of the Curran after December 31, 2014 violated Section 7.02**(b)**. NSF likewise does not appeal that ruling. Instead, NSF contends that Appellees' operation of the Curran violates Section 7.02**(a)**, a claim that NSF affirmatively abandoned below and is, in all events, entirely meritless.

After the Court of Chancery rejected NSF's principal claims in the first case, NSF brought a second action and moved for a preliminary injunction on the same theory about the meaning of Section 7.02(b)—*i.e.*, that the theater owner has "control" over a production merely by agreeing with the producer that the show can be presented at the theater—that the trial court had rejected in the first case. NSF's proposed injunction sought to eliminate competition from two productions that were to play at the Curran—*Dear Evan Hansen* ("*DEH*") and *Harry Potter and the Cursed Child* ("*Harry Potter*")—based on the argument that Section 7.02(b) prohibits the owner and operator of the Curran from contracting with a producer to have a show play at that theater (*DEH*) or even leasing the Curran to a third-party theater operator which then contracts with the producer (*Harry Potter*). The Court of Chancery rejected NSF's claims entirely, holding—in findings of fact that NSF does not challenge—that Appellees did not "control" either *DEH* or *Harry Potter*, and also ruling correctly on the law that NSF's interpretation of the LLC Agreement was "unreasonable."

In their cross-appeal, Appellees appeal from the trial court's erroneous declaratory judgment expanding "Shorenstein Entity" to bind affiliates of Members that never signed the LLC Agreement. When that phrase is properly limited to the Member (CSH Theatres), NSF's case—including these two appeals—fail entirely. The cross-appeal is important because, in the absence of a ruling, NSF threatens to continue to initiate litigation in an attempt to interfere with Appellees' lawful ownership and operation of the Curran.[3]

The Court of Chancery's rulings—except for the single ruling that is the subject of the cross-appeal—conform to the plain language of Section 7 of the LLC Agreement, are consistent with the overwhelming evidence adduced in both actions and should be affirmed.

[3] Just last week, on February 7, 2019, NSF sent Appellees a letter threatening a third litigation challenging the only other production slated to play at the Curran. (B665.)

NATURE OF PROCEEDINGS

This consolidated appeal is from rulings made by the Court of Chancery in 2018 in the two related cases. In the first, the trial court entered a Final Judgment on September 20, 2018 based on a Memorandum Opinion issued on July 31 (the "Trial Opinion") that followed a five-day trial in the fourth quarter of 2017. The trial court dismissed NSF's claims for an oral lease, as well as its claims of improper competition under Section 7 of the LLC Agreement. NSF mostly ignores the evidence in that case, which consisted of 543 exhibits and the testimony of 15 witnesses (11 in the courtroom and 4 by deposition), and the trial court's extensive fact findings and comprehensive legal rulings in its 105-page Trial Opinion.

In the second action, the trial court issued a Memorandum Opinion on November 30, 2018 (the "PI Opinion") following expedited discovery on NSF's motion for a preliminary injunction. The court again rejected NSF's claim that the staging of shows—in particular *DEH* and *Harry Potter*—violated Section 7.02(b). At NSF's request, on December 21, 2018, the Court of Chancery entered partial final judgment in Appellees' favor.

SUMMARY OF ARGUMENT

1. Denied. NSF waived any claim under Section 7.02(a) of the LLC Agreement by abandoning that theory at trial in the first action. In its post-trial brief in the Court of Chancery, NSF disclaimed reliance on Section 7.02(a), stating that its competition claim "*has always been* a claim that the Hays Group's improper competition violates its duties of loyalty and *Section 7.02(b)*"—and not Section 7.02(a). (A894 (NSF March 2, 2018 Post-Trial Reply Brief 41) (emphasis supplied).) NSF's Section 7.02(a) claim is entirely meritless in any event. That provision does not address, much less prohibit, competition with SHN, particularly in light of the more specific provisions of Sections 7.02(b) and 7.06 that expressly allow even the Members to compete. Moreover, even if Section 7.02(a) somehow prevents competition by Affiliates of the Members—and it does not—NSF failed to prove any violation of that provision at trial. The fact findings of the trial court—not challenged on this appeal—defeat this claim.

2. Denied. In the second action, the Court of Chancery held correctly that the staging of *DEH* and *Harry Potter* at the Curran does not breach Section 7.02(b) of the LLC Agreement. That provision applies only when the "Shorenstein Entity" has "control" of a production that is staged in a theater within 100 miles of San Francisco. After considering the evidence, the trial court found that Appellees do not "control . . . where [either] Production plays and the terms

and conditions of" the *DEH* or *Harry Potter* "engagement," as Section 7.02(b) requires. Although it does not challenge any of the trial court's findings of fact with respect to those two shows, NSF asks this Court to reverse the ruling by arguing that the trial court "misunderstood" its position. That is manifestly incorrect. The trial court fully considered—and rejected—NSF's arguments regarding "control."

3. With respect to the cross-appeal, the Court of Chancery erred in declaring that the term "Shorenstein Entity," as used in the LLC Agreement, binds not only CSH Theatres (the party to the contract and Member of SHN), but also all non-party Permitted Transferees of its Membership Interest, including Affiliates.[4] The trial court's interpretation violates basic principles of contract interpretation, including the rule that only parties are bound by a contract, and conflicts with the extrinsic evidence. At trial, Robert Nederlander—who negotiated and signed the LLC Agreement for NSF—conceded that Section 7.02 applies only to SHN's two Members. This concession was unavoidable, because the drafting history of Section 7.02 and the pre-litigation conduct of NSF and its Affiliates prove that Section 7.02 was intended to, and always did, apply to the Members alone.

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[4] The terms "Members," "Affiliates," "Permitted Transferees" and "Membership Interest" are defined in the LLC Agreement and described *infra*, pp. 16-17.

STATEMENT OF FACTS

Although NSF does not challenge the Court of Chancery's findings of fact, NSF's Opening Brief repeatedly contradicts those findings and mischaracterizes the trial court's rulings and the evidence on which they were based. The true facts (many of which were undisputed), and the trial court's actual rulings, are set forth below.

A. The Parties

1. SHN and the Predecessor Partnerships

In 1978, James M. Nederlander (known as Jimmy, and one of Robert Nederlander's older brothers), and Walter Shorenstein, Carole Hays' father, formed a partnership called Shorenstein-Nederlander Productions of San Francisco to operate the Curran Theatre pursuant to a written lease with the theater's then-owner, the Lurie Company ("Lurie"). (B225 (Tr. 828:6-16 (Nederlander));[5] A183-86; *see also* Trial Opinion 7.)

The partnership had two general partners—Nederlander of California, Inc. (the Nederlander entity) and CJS Trust-A (the Shorenstein entity). (B267 (Tr. 911:9-17 (Nederlander)); A186; B1-2; *see also* Trial Opinion 7.) In 1980, the partnership entered into a new written lease of the Curran (the "Lurie Lease"),

[5] Citations to "Tr." refer to the trial transcript in the first action and include the last name of the witness whose testimony is cited.

which was extended by written amendments in 1989, 1990 and 1997, with a final expiration date of December 31, 2014. (B142 (Stip. Facts ¶¶ 37, 39);[6] B181-82 (Tr. 180:14-181:8 (Holland)); *see also* Trial Opinion 8.) In the interim, that partnership, along with a sister partnership between CJS Trust-A and Nederlander-Golden Gate, Inc., purchased and operated two other theaters in San Francisco—the Orpheum and the Golden Gate. (B141 (Stip. Facts ¶ 34); A241-42; B10-11.)

In 1990, the general partners at the time—Nederlander of California and Nederlander-Golden Gate (on the Nederlander side) and CJS Trust-A (on the Shorenstein side)—sued one another, alleging breaches of the partnership agreement. (A238-75; B3-30.) A settlement was reached two years later, and as part of the settlement, the parties entered into a new partnership agreement on May 22, 1992. (B264 (Tr. 908:16-23 (Nederlander)); A277; *see also* Trial Opinion 8.)

Section 4 of the 1992 partnership agreement provided that (i) "*[b]oth partners* will devote their efforts to maximize the economic success of the Partnerships and avoid any conflicts of interest," and (ii) "[n]either *party* [to the contract] will stage any production within 100 miles of San Francisco" unless certain conditions were met. (A277 (emphases supplied); *see also* Trial Opinion 76.) As Robert Nederlander admitted at the 2017 trial, the "parties" and "partners"

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[6] Citations to "Stip. Facts" refer to the facts the parties stipulated to in the October 18, 2017 Pretrial Stipulation and Order (B134-48).

to that agreement were the three general partner entities who signed the 1992 agreement, and no one else. (B270 (Tr. 914:4-8 (Nederlander)).)

In his trial testimony, Robert Nederlander also conceded that Section 4 of the 1992 agreement was "meant to create duties and obligations with respect to the parties to that contract" and did not restrict or apply to any affiliate of the three contractual parties or the family members associated with those entities. (B269-70 (Tr. 913:19-914:8 (Nederlander)).) His clear testimony was that Section 4 of the 1992 partnership agreement applied only to the partner entities, not their affiliates or the families who controlled them. (*Id*.) Mr. Nederlander further testified that the provisions of Section 4 of the 1992 agreement were "carried forward identically" to Section 7 of the LLC Agreement with no "substantive changes made." (B266 (Tr. 910:11-22 (Nederlander)); *see also* B266-67 (Tr. 910:23-911:2 (Nederlander)).) NSF fails even to mention this important concession in its brief to this Court.[7]

In June 1992, Nederlander of California and Nederlander-Golden Gate formed NSF, which became the Nederlander partner in the then-existing partnerships. (B60.) CJS Trust-A formed CSH Theatres in July 1998, and CSH

[7] NSF agrees that the "language regarding 'Cooperation and Competition'" in Section 4 of the 1992 contract "would ultimately become the LLC Agreement provisions at issue in this appeal"—*i.e.*, Section 7.02. (Opening Brief of Appellant NSF ("NSF Br.") 8.)

Theatres became the Shorenstein partner. (B134 (Stip. Facts ¶¶ 1-2); B35.) In November 2000, NSF and CSH Theatres converted the partnership into SHN and entered into the LLC Agreement. (B137 (Stip. Facts ¶ 16); A285 (LLC Agreement 1); *see also* Trial Opinion 8-9.)

The LLC Agreement states that the Members are "the Shorenstein Entity and the Nederlander Entity," and anyone "admitted to the Company as a Member." (A287.) NSF and CSH Theatres have always been, and remain, the only Members of SHN. (B134 (Stip. Facts ¶ 1); B276-77 (Tr. 920:10-921:7 (Nederlander)); A321-22 (LLC Agreement 37).)[8]

2. NSF and the Nederlander Family

NSF is a California partnership controlled exclusively by Robert Nederlander "through ownership of preferred units in its general partner." (B135 (Stip. Facts ¶ 4); B259 (Tr. 903:1-3 (Nederlander)); *see also* Trial Opinion 3.) Mr. Nederlander is also the former president and current director of The Nederlander Organization, a Nederlander-family company that owns and/or operates 9 Broadway theaters in New York City and 15 theaters elsewhere in this country (B255 (Tr. 899:13-15 (Nederlander)); B664), including "Broadway San Jose, which stages Broadway-style productions at the San Jose Center for the

[8] Each Member is entitled to appoint two Directors to SHN's Board and one Co-President of SHN. (A291-92 (LLC Agreement §§ 4.01(c), 4.02(a)).)

Performing Arts, a venue located less than 100 miles from San Francisco" (B137 (Stip. Facts ¶ 14)).

Robert Nederlander has also been an NSF-appointed Director of SHN since it was formed in 2000 and has been the NSF-appointed Co-President for the last 10 years. (B135 (Stip. Facts ¶ 4).) Robert Nederlander was involved in negotiating the LLC Agreement and is the only living signatory to it. (B230 (Tr. 838:6-19 (Nederlander)).)

3. Carole Hays and Her Affiliates

Carole Hays is a highly respected Broadway producer who has won eight Tony Awards. (B147 (Stip. Facts ¶ 63); B197 (Tr. 444:3-6 (C. Hays)).) She is a beneficiary of CJS Trust-A, the trust that controls CSH Theatres (the SHN Member). (B134 (Stip. Facts ¶ 2).) For years, Mrs. Hays was a Director of SHN and Co-President, but resigned those positions on June 2, 2014. (B135 (Stip. Facts ¶ 5); *see also* Trial Opinion 5.) Jeffrey Hays is Mrs. Hays' husband and served as a Director of SHN from June 2010 until he resigned on October 27, 2014. (B135 (Stip. Facts ¶ 6); *see also* Trial Opinion 5.)

B. Article VII of the LLC Agreement

NSF's appeal is based on its assertion that the trial court (which heard five days of testimony in 2017 and had before it a voluminous record in both actions) totally misunderstood Article VII of the LLC Agreement, which by its

terms outlines the "Relationship Among [the] Members" of SHN. (A285.) The two "Members" are, and have always been, NSF and CSH Theatres. Section 7.02 sets out certain limited and defined restrictions applicable only to the Members with respect to "Cooperation and Non-Competition," while Section 7.06 expressly allows competing "Outside Activities" by the Members and their Affiliates.

1. Sections 7.02 and 7.06

Section 7.02(a) states that the "Shorenstein Entity and the Nederlander Entity . . . agree to devote their efforts to maximize the economic success of the Company and to avoid any conflicts of interests between the Members," and that "[a]ll actions of the Members and their representatives with regard to the Company and theater matters will be carried out in good faith and in a prompt and expeditious manner." (A304.) Section 7.02(a) does not, as NSF argues (NSF Br. 24), say anything at all about (much less prohibit) competing with SHN. And, by its plain terms, the provision requiring actions to be done in "good faith" applies only to "the Member and its representatives" and only insofar as they relate to "the Company and theater matters." (A304.)[9] Section 7.02(a) says nothing about Affiliates of the Members or actions taken in respect of other ventures, such as the Curran.

[9] NSF ignores entirely this plain language. (NSF Br. 24-25.)

Section 7.02(b) states that "neither the Shorenstein Entity nor the Nederlander Entity will stage any Production that it controls (as defined in Section 7.03) within 100 miles of San Francisco" unless one of three conditions is met: "(i) such Production has first played in one of the [SHN] Theatres; or (ii) such Production has been rejected for booking at one of the [SHN] Theatres by the other Member's representative on the Board of Directors; or (iii) the Company shares in the profits and/or losses of any booking pursuant to an agreement mutually acceptable to the Members." (A305.) The key phrases for purposes of this appeal are the "Shorenstein Entity" and "Production that it controls." Unless NSF is correct about the proper meaning of both phrases, it must lose.

Section 7.06 of the LLC Agreement expressly permits "any Affiliate of any Member"—and, indeed, the Members themselves—to compete with SHN. (A305.) That provision states in full:

> Subject to the other provisions of this ARTICLE VII, including Section 7.02, *any Member*, *any Affiliate of any Member or any officer or director of the Company* shall be entitled to and may have business interests and engage in business activities in addition to those relating to the Company, and may engage in the ownership, operation and management of businesses and activities, for its own account and for the account of others, and may (independently or with others, whether presently existing or hereafter created) own interests in the same properties as those in which the Company or the other Members own an interest, without having or incurring any obligation to offer any interest in such properties, businesses or activities to the Company or any other Member, and *no*

> *other provision of this Agreement shall be deemed to prohibit any such Person from conducting such other businesses and activities. Neither the Company nor any Member shall have any rights in or to any independent ventures of any Member or the income or profits derived therefrom.*

(A305 (emphasis supplied).)

2. The "Shorenstein Entity" and "Nederlander Entity"

The LLC Agreement is clear that the "Shorenstein Entity" and "Nederlander Entity" are the "Members" of SHN. The "Members" are expressly defined as "the Shorenstein Entity and the Nederlander Entity and any additional Person who is admitted to the Company as a Member." (A287 § 1.01.) CSH Theatres and NSF are the original Members, and no other "Person" has ever been admitted as a Member. (B134 (Stip. Facts ¶ 1); B276 (Tr. 920:10-921:7 (Nederlander)).) The term "Permitted Transferees" is defined in the LLC Agreement as entities to whom the two Members "may Transfer" their "Membership Interest"[10] (A310 § 10.01(a)), and those entities include "(a) an Affiliate of any Member or (b) in the case of a Nederlander Entity, a Nederlander

[10] A "Membership Interest" is "a Member's aggregate rights in the Company." (A287 § 1.01.)

Controlled Entity or any member of the Nederlander family"[11] (A288 § 1.01). For a Permitted Transferee to become a Member (and thus a Shorenstein Entity or a Nederlander Entity), that person or entity must first "accept and adopt the provisions of this Agreement in writing." (A310 § 10.02; *see also* A316 § 11.01.) All agree no such transfer has ever occurred, and no such writing exists. (B134 (Stip. Facts ¶ 1).) Thus, the Shorenstein Entity is CSH Theatres and the Nederlander Entity is NSF.

NSF's rejected competition claims depend on a contortion of the LLC Agreement. *First*, NSF contends, and the trial court erroneously found, that, because the LLC Agreement states in the preamble that it was "***entered into . . . by and between***" CSH Theatres "(together with any Permitted Transferees, as hereinafter defined, the 'Shorenstein Entity')" and NSF "(together with any Permitted Transferees, as hereinafter defined, the 'Nederlander Entity'), ***as members***" (A285 (emphases added)), each and every "Permitted Transferee"—whether then-existing, or later coming into being—assumed all of the rights and

[11] A Member's "Affiliate" is defined as an individual or entity that controls or is controlled by a Member. (A286.) Members of the "Nederlander Family"—who are among NSF's "Permitted Transferees"—are defined to include any "descendant of David T. Nederlander" (Mr. Nederlander's father, who died 52 years ago) and their spouses, while "Nederlander Controlled Entity"—also an NSF Permitted Transferee—includes all entities directly or indirectly owned by a member or members of the Nederlander Family. (A287-88.)

obligations of the Members set forth in the Agreement (Trial Opinion 67-68). The only parties that "entered into" and executed the LLC Agreement are CSH Theatres and NSF (A321 (LLC Agreement 37)), and they are (and have always been) the only "Members" of SHN. The preamble to the LLC Agreement does nothing other than describe the two *parties* to the contract, and "as members," which all agree are CSH Theatres and NSF alone.

Second, NSF admitted at trial that both parties always understood that Section 7.02 imposed obligations on the Members alone. Robert Nederlander—who executed the LLC Agreement for NSF in 2000 and claimed familiarity with what it says and means (B284-85, 286 (Tr. 928:10-929:9, 930:15-17 (Nederlander)))—rejected his own lawyer's claim that Section 7.02 of the LLC Agreement imposes obligations on anyone other than NSF and CSH Theatres (the two Members of SHN). Mr. Nederlander testified unequivocally that the obligations in Section 7.02 were "carried forward identically" from Section 4 of the 1992 partnership agreement (B266 (Tr. 910:11-22 (Nederlander)); *see also* A279-80), and that Section 4 of the prior contract (i) "was meant to create duties and obligations with respect to the parties to that contract" only and (ii) did not apply "personally" to members of the Nederlander family or the companies and entities they control (B268, 270 (Tr. 912:10-14, 914:4-8 (Nederlander))). This testimony alone sinks NSF's position on appeal.

Indeed, after being shown Section 7.02(a), Mr. Nederlander said from the witness stand that, on the Nederlander side, Section 7.02 "applies to NSF and—that's what it applies to[,] NSF." (B280-81 (Tr. 924:24-925:7 (Nederlander)).) Just moments later, he agreed that the phrase "Nederlander Entity" in the LLC Agreement refers to "just NSF" "on the Nederlander side." (B283 (Tr. 927:17-21 (Nederlander)).) This is diametrically opposed to NSF's contention on appeal that the "Nederlander Entity" and "Shorenstein Entity" phrases in Section 7.02 should be understood to include their Affiliates.

If more were needed, Mr. Nederlander supplied it. He testified that the obligations in Section 7.02(a) do not apply to "Permitted Transferees." He admitted at trial that (i) his brother Jimmy Nederlander and his nephew James L. Nederlander "never devoted their efforts to maximizing the success of SHN" (as Section 7.02(a) requires of the "Nederlander Entity") because "[t]hey didn't have to" comply with that section (B282 (Tr. 926:7-10 (Nederlander))), and (ii) his two sons, Robert, Jr. and Eric, were never "required by Section 7.02(a) to devote their efforts to maximize the economic success of SHN" (B294 (Tr. 953:14-18 (Nederlander))). There is no dispute that Jimmy, James L., Robert, Jr. and Eric Nederlander are Nederlander family members and thus "Permitted Transferees" who, under NSF's interpretation of Section 7.02(a), would be required to "devote their efforts to maximize [SHN's] economic success." (A304 (LLC Agreement

§ 7.02(a)).) Mr. Nederlander's own testimony directly refutes NSF's principal contention on this appeal.

The parties' course of conduct prior to this litigation also confirms that Affiliates of the Members are not bound by Section 7.02. NSF stipulated that the Nederlander family controls the Nederlander Organization (of which Robert Nederlander is a board member, part owner, and former President), and that the Organization "operates Broadway San Jose, which stages Broadway-style productions at the San Jose Center for the Performing Arts, a venue located less than 100 miles from San Francisco." (B136-37.) In addition, Mr. Nederlander testified at trial that, in the mid-2000s, entities that he controlled operated two other competing theaters in San Francisco. (B232-33, 259 (Tr. 840:16-841:14, 903:9-15 (Nederlander))). Yet the Nederlanders never viewed themselves as limited from competing with SHN by Sections 7.02(a) or 7.02(b).[12] (B169-70 (Tr. 124:11-125:3 (Holland)); A1013-16.)

3. "Control" of Productions

Section 7.02(b) applies only to a Production that a Member "controls." The definition of "control" is found in Section 7.03, which states that "control over the Production" means "the Person having the ability to determine

[12] NSF also conceded as much in the second action. (A1118 (NSF October 29, 2018 Opening Preliminary Injunction Brief 58).)

where the Production plays and the terms and conditions of said engagement." (A305.) Section 7.02(b) refers not at all to control of a theater, but instead to control of the "Production" alone. "Control" is thus the control that producers and show owners have over their own productions. First, Section 7.02(b) itself does not apply if the Entity in "control" offers to have the Production presented at an SHN theater, or offers to "share[] in the profits and/or losses of any booking." This is most logically applicable only to a producer who has the rights to the show itself, not the owner or operator of a theater. Likewise, Section 7.03 obligates SHN to make its theaters available to a Production controlled by an Entity "or any Affiliate thereof" on a "most favored nation" basis. These provisions confirm that the necessary "control" belongs to an actual or potential *counter-party* to the theater owner/operator.[13]

C. CSH Curran's 2010 Purchase of the Curran

In 2009, the owner of the Curran, Lurie, offered to sell the theater to SHN for $30 million, and in January 2010 Lurie lowered its price to $17.5 million. (B144 (Stip. Facts ¶ 42); B236-37, 329-30 (Tr. 849:17-850:3, 1037:19-1038:3 (Nederlander)).) Mr. Nederlander was "unwilling" to allow SHN to buy the

[13] In any event, as set forth below (*see* Section K, *infra*), the evidence in the second case, as in the first case, was overwhelming that producers control the shows they create, not theater owners or operators. (B194 (Tr. 417:22-24 (C. Hays)); B576-77; B597-98, 601-02.)

Curran even at the reduced price, which he considered "outrageous." (B144 (Stip. Facts ¶ 43); B299 (Tr. 988:3-4 (Nederlander)); *see also* B297, 307 (Tr. 986:17-22, 999:11-14 (Nederlander)).)

After Robert Nederlander vetoed any deal for SHN, Carole Hays indicated that she might wish to purchase the Curran herself. (B188, 200 (Tr. 291:9-16, 475:11-18 (C. Hays)).) In 2010, Mrs. Hays "asked Mr. Nederlander's permission to purchase the Curran," and "Mr. Nederlander gave his approval." (B144 (Stip. Facts ¶ 45).) On December 15, 2010, Mrs. Hays purchased the Curran, through CSH Curran, for $16.6 million. (B145 (Stip. Facts ¶ 49).)

D. The Alleged "Promise" to Lease the Curran to SHN

There is no dispute that Robert Nederlander consented to Mrs. Hays' purchase of the Curran. (B144 (Stip. Facts ¶ 45); NSF Br. 13.) At trial and again on this appeal, however, NSF argues that when Mr. Nederlander gave Mrs. Hays his consent, it was "on the condition that Carole agree to lease the Curran to SHN for the life of SHN" at an unspecified rent (which Mr. Nederlander would unilaterally determine). (NSF Br. 13.) The 2017 trial was in large part about this allegation—wholly rejected by the trial court—of a 2010 oral lease agreement.

Mr. Nederlander testified at trial that during a telephone call on an unspecified date in 2010, he told Carole Hays that Lurie was asking "too much money" for the Curran (B238 (Tr. 851:17-20 (Nederlander))), but "that if she

wanted to buy it, she has my permission, but it's with the understanding and the promise . . . that [she] would lease the theater to SHN" (B239 (Tr. 852:3-6 (Nederlander))). According to Mr. Nederlander, Mrs. Hays said "Okay," and nothing more. (B239 (Tr. 852:8-10 (Nederlander)).) Even Mr. Nederlander agreed that there was never any mention of—let alone agreement about—rent in any such conversation or otherwise. (B239 (Tr. 852:11-21 (Nederlander)).)

Carole Hays testified that the alleged promise about a new or renewed lease never occurred, and that she never agreed to lease the Curran back to SHN when the Lurie Lease expired on December 31, 2014. (B206-07 (Tr. 492:8-493:3 (C. Hays)).) Mr. Nederlander conceded at trial that there was never any document of any kind reflecting any such promise. (B301-02 (Tr. 990:3-6, 991:11-15 (Nederlander)).)

E. NSF Had An Opportunity to Enter into a New Lease of the Curran for SHN, but Declined.

Mr. Nederlander also conceded at trial that in 2012 and 2013, the parties tried to negotiate a new lease of the Curran for SHN (B312 (Tr. 1020:12-19 (Nederlander))), which would have been unnecessary had a binding oral agreement been reached in 2010. In August and October 2012, each side exchanged written lease proposals (B70-75; B76-78; B79-82), but, as Mr. Nederlander testified, those proposals "were far apart" on the basic terms of rent (B319 (1027:4-7 (Nederlander))) and duration (B315-16 (Tr. 1023:6-1024:18 (Nederlander))). Mr.

Nederlander admitted at trial that "[t]here were no further proposals after October 2012 that closed the gap" (B319 (Tr. 1027:15-18 (Nederlander))), and that "[u]ltimately, the Curran lease was not renewed" (B244 (Tr. 857:19-21 (Nederlander))). Notably, none of the 2012-13 proposals mentioned anything about some supposed prior promise or agreement to lease the Curran. (B70-75; B76-78; B79-82.) And during the actual negotiations, the Nederlander side never said that if Mrs. Hays failed to agree to a lease of the Curran Theatre, the LLC Agreement would prohibit her from using it to compete with SHN.

F. The Expiration of SHN's Lease of the Curran

At a January 28, 2014 meeting of SHN's Board, the Hays side said that it was unwilling to provide SHN with a new lease to the Curran unless NSF agreed to revise the LLC Agreement to create a new management structure. (B212, 324 (Tr. 627:20-24 (J. Hays), 1032:8-9 (Nederlander)).) Mr. Nederlander rejected that idea, the LLC Agreement remained unchanged, and no new lease was agreed to. (B203, 213 (Tr. 489:11-490:2 (C. Hays), 628:1-2 (J. Hays)).)

Following expiration of the Lurie Lease on December 31, 2014, CSH Curran took possession and spent more than $20 million on extensive renovations to the Curran over the next two years. (B206, 219 (Tr. 492:2-4 (C. Hays), 686:1-3 (Hart)).) The Curran reopened in January 2017 with the Broadway show *Fun Home*, and Curran Live LLC—which is controlled by one of Mrs. Hays' trusts—

now operates the theater. (B148 (Stip. Facts ¶ 70).) By the time the trial commenced in October 2017, the Curran had hosted "[m]ultiple competing Productions." (NSF Br. 16.)

G. The Trial Evidence on Damages

NSF offered no theory of damages in respect of any specific competing show presented at the Curran. Instead, NSF's damages expert presented a damages theory based solely on the supposed 2010 oral lease agreement and conceded that he did not calculate damages for the loss of any "individual shows." (B337-38 (Tr. 1114:12-1115:10 (Hekman)).)

H. The Trial Court's July 31, 2018 Decision in the First Action

Virtually all of NSF's claims and contentions were rejected by the Court of Chancery.

The trial court rejected entirely NSF's improper competition claims under Section 7.02, which is the sole focus of this appeal. The court ruled against NSF's proposed interpretation of Section 7.02 as prohibiting the staging of competing shows at the Curran, holding that Section 7.06 of "[t]he LLC Agreement expressly allows the Hayses to compete, both in their capacity as managers of the Company and in their capacity as Affiliates of CSH Theatres." (Trial Opinion 64.) The court also rejected NSF's position that CSH Theatres' Affiliates "control" productions under Section 7.02(b) merely by virtue of owning

and operating the Curran and entering into contracts with producers that allow those producers to present their shows there. (Trial Opinion 36, 78.) The court held that Section 7.02(b) applies only in "limited circumstances" where the Shorenstein or Nederlander Entity has actual "control" of a production, meaning "the ability to determine where the Production plays and the terms and conditions of said engagement." (Trial Opinion 70, 72.) Thus, "only controlled shows, not all shows, must be offered to the Company." (Trial Opinion 78.)

In reaching this conclusion, the court erroneously interpreted the terms "Shorenstein Entity" and "Nederlander Entity," as used in Section 7.02(b), to include any "Permitted Transferee" of a Member, including either Member's "Affiliates," but that ruling had no practical effect on the first case. This is because NSF failed to prove any breach of Section 7.02(b) with respect to any show that had been staged or would be staged at the Curran. (Trial Opinion 35, 72-74.) The trial court's declaratory judgment about the meaning of "Shorenstein Entity," which allowed NSF to bring a second action, is the subject of Appellees' cross-appeal. Properly construed, "Shorenstein Entity" means only CSH Theatres, and that definition alone requires rejection of NSF's appeals.

Despite extending improperly the reach of Section 7.02(b) to include the Members' Affiliates, the court in the first action found that Appellees had sufficient "control over" just one production—*Fun Home*—because Mrs. Hays was

a producer of that show, had a minority ownership interest in it and had a contractual "first right to present the first commercial production of the Play in the [San Francisco] Bay Area" at the Curran, and to prevent the production from "perform[ing] at any other Bay Area theater but the Curran." (Trial Opinion 72-73.) However, NSF failed to prove other essential elements of its contract claim, including that *Fun Home* failed to satisfy any of the three conditions in Section 7.02(b). (Trial Opinion 73.) Further, the trial court ruled that NSF "has not offered any evidence regarding its damages relating to *Fun Home* and, thus, has not satisfied the final element for its breach of contract claim." (Trial Opinion 74.) NSF does not appeal the court's complete rejection of its Section 7.02(b) claim following trial.

The trial court did not address any independent claim under Section 7.02(a) because NSF did *not* argue to the trial court—as it does for the first time on this appeal—that the Hayses' operation of the Curran violates Section 7.02(a). Instead, NSF relied solely on Section 7.02(b), asking the court in post-trial briefing to "enjoin the Hays Group from competing with SHN within 100 miles of San Francisco pursuant to Section 7.02(b) of the LLC Agreement." (A760 (NSF January 19, 2018 Post-Trial Opening Brief 6).) This is unsurprising since Robert Nederlander—the human embodiment of NSF—conceded at trial that Section 7.02(a) applies only to the current Members of SHN, and not to their Affiliates or

owners or family members. (B283 (Tr. 927:10-21 (Nederlander)); *see* pp. 18-20, *supra*.)

Beyond these rulings, the court rejected virtually all of NSF's other claims. *First*, the court rejected entirely NSF's claim of an oral lease. The court held that NSF failed to prove Mrs. Hays had made any "promise[] to rent the Curran to the Company after the expiration of the Lurie Lease." (Trial Opinion 43.) In doing so, the court found that Robert Nederlander's testimony about the supposed 2010 oral agreement with Mrs. Hays was "not even consistent with itself" and not "credible." (Trial Opinion 50 n.201.) The court instead found that Mr. Nederlander gave his unconditional consent for Mrs. Hays to purchase the Curran. (Trial Opinion 43.) The Court also held that the statute of frauds would bar enforcement of any oral lease agreement in any event. (Trial Opinion 54-60.) Although NSF has never appealed this ruling, its Opening Brief offers a slew of contentions that are contradicted by it. (NSF Br. 13-17, 26-28.)

Second, and again contrary to NSF's assertions on this appeal, the trial court did not find any improper "attempt to wrest control of SHN" by Mrs. Hays or anyone associated with her. (NSF Br. 14.) In fact, the court held precisely the opposite: that Mrs. Hays' effort to obtain a higher rent for the Curran than what the Nederlander side offered "does not amount to a failure to negotiate in good faith," nor does "negotiating for more control of the Company" in exchange for a

new lease of the Curran. (Trial Opinion 61.) NSF nowhere challenges these rulings on appeal, but nevertheless argues in its Opening Brief about some supposedly improper effort by Mrs. Hays to "seize control" of SHN. (NSF Br. 14-17.) These mischaracterizations should be ignored.

Finally, the trial court held that the Hayses had breached their fiduciary duty of loyalty as managers of SHN prior to their resignations in 2014 in two minor respects unrelated to the operation of the Curran Theatre, which did not reopen until 2017. (Trial Opinion 79.) Even then, the court found that NSF had not "provided the Court with *any* information about the harm caused to the Company," and it thus awarded only $1.00 in nominal damages. (Trial Opinion 89 (emphasis in original); B451-52 (Judgment ¶ 2(a)).) The trial court otherwise rejected NSF's litany of other complaints about Carole and Jeff Hays, which NSF nevertheless repeats in its Opening Brief. (NSF Br. 14-16.)[14] NSF does not appeal those rulings.

[14] For example, NSF contends that "[t]he Hayses held SHN hostage by threatening to withhold the Curran lease to obtain control of SHN," and that Mrs. Hays "physically blocked the exit to a board meeting until their demands for control were met." (NSF Br. 15.) The trial court did not find this conduct to breach any duty, but instead denied this claim along with NSF's other claims. (Trial Opinion 80-83, 104.)

I. Post-Trial Proceedings

On August 6, 2018, NSF moved for "clarification" of the July 31 Opinion, but again did *not* argue that any Appellee violated Section 7.02(a). The trial court denied the motion, ruling that "there [wa]s nothing to clarify" in the July 31 Opinion. (B446 (Order Denying Motion for Clarification ¶ 3).)

Final Judgment was entered on September 20, 2018. In its Final Judgment, the "Court dismisse[d] Count II of the Amended Counterclaims"—NSF's claim for a breach of the LLC Agreement—"in its entirety, and grant[ed] final judgment in favor of CSH Theatres on that claim." (B452 (Judgment ¶ 3(a)).) The court issued a declaration that, among other things, the "'Shorenstein Entity' means CSH Theatres and its Affiliates" and "[t]he LLC Agreement permits Counterclaim Defendants to operate the Curran in competition with SHN, including by booking Broadway-style shows, so long as the persons who fall within the definition of the 'Shorenstein Entity' comply with the obligations set forth in Section 7.02(b) of the LLC Agreement." (B453 (Judgment ¶¶ 6(c), 6(d)).)

J. The Second Action

On September 25, 2018, five days after entry of the Final Judgment, NSF filed the second action, resurrecting the claim for breach of Section 7.02(b), and seeking to enjoin CSH Theatres' Affiliates (and Appellees here) from staging the Broadway productions *DEH* and *Harry Potter* "within 100 miles of San

Francisco (including at the Curran Theatre)." (B493-94 (Motion for Prelim. Inj. ¶ 1).) *DEH* played at the Curran in December 2018, and *Harry Potter* is scheduled to begin playing in the Fall of 2019. (B459, 476 (2018 Complaint ¶¶ 6, 68).)

NSF's claims were premised on the same theory of "control over production[s]" under Section 7.02(b) that the trial court had rejected in the first action—namely, that "when and where a production will play is under the control of both the producers or presenters, as well as the theater owners or operators, because determining whether the production will play at a particular theater and the terms of the engagement requires joint approval of both the production and venue representatives." (B468 (2018 Complaint ¶ 43).) NSF claimed that a theater owner/operator by definition has "control" over any production staged at the theater simply by agreeing to allow the show to be presented on specific terms. Tellingly, NSF never argued in the second action that the staging of *DEH* or *Harry Potter* implicated Section 7.02(a).

K. The Preliminary Injunction Record

The parties engaged in expedited discovery, which demonstrated that the producers of *DEH* and *Harry Potter*—none of whom are affiliated with Mrs. Hays or any other Appellee—are and were the only persons in "control" of those shows.

1. The Producers of *DEH* and *Harry Potter* Chose the Curran Over an SHN Theater.

a. *Dear Evan Hansen*

The evidence was undisputed that neither Carole Hays nor any "Affiliate" had any financial or other interest in *DEH*, or obtained any rights with respect to that production beyond the arms'-length agreement for *DEH* to be presented at the Curran in December 2018. (B567; B633-35; B575-76, 579.) *DEH*'s lead producer (Stacey Mindich) alone controlled where and on what terms the show would be staged. In 2017, Ms. Mindich offered specific dates in December 2018 for *DEH*, and both SHN and Curran Live (the operator of the Curran Theatre) competed to stage her show at their respective theaters. (B602-05.) SHN's CEO (Greg Holland) testified that he "tried to convince the producer of *Dear Evan Hansen*," Ms. Mindich, "to show that show at one of the SHN theatres." (B505.) Obviously, none of his efforts to land *DEH* at an SHN theater were directed to Carole Hays or her Affiliates. Holland (SHN) thus recognized that the person who "controls" where a production plays is the producer.

In October 2017, after Mr. Holland learned that *DEH*'s producer had chosen the Curran, he explained in an email to Mr. Nederlander that "Stacey Mindich has decided to play DEAR EVAN HANSEN at the Curran because: 1. She wants to play the smaller venue. 2. The Curran gave the tour an amazing deal." (B103.) The producer "decided" where the show would play precisely

because it is the producer's choice. Further acknowledging that the producer alone chose where and on what terms to stage *DEH*, Mr. Holland informed SHN's Board about Ms. Mindich's decision, noting that "[t]he show wanted to play to the more intimate Curran Theatre." (B99.)

On December 11, 2017, Curran Live and Ms. Mindich's production company entered into two agreements to memorialize the terms of the deal to present *DEH* at the Curran. (A714-25.) Nothing in those agreements gave Curran Live or CSH Theatres or its Affiliates control over *DEH*. The terms provided the dates of performances, the financial terms (including certain guaranteed revenue for the producer) and other ticketing and marketing terms. (A718-20, 722-24.) Mrs. Hays also agreed to indemnify *DEH*'s producer if the court were to enjoin the show from playing at the Curran in the first action. (A688.)

b. *Harry Potter*

The evidence about "control" of *Harry Potter* was even weaker for NSF. In the Fall of 2017, the Ambassador Theater Group ("ATG"), an international theater owner/operator with no affiliation to any Appellee, approached Mrs. Hays about a potential long-term lease or outright purchase of the Curran Theatre. (B615-16.) ATG does not control *Harry Potter*, the rights to which are owned by a separate production company that is in turn controlled by the show's producers. (B618-19.)

In April 2018, after months of negotiations, CSH Curran and Curran Live (the Curran's owner and operator) signed a Memorandum of Understanding ("MOU") with an ATG affiliate to lease the Curran for three-and-a-half years (beginning July 1, 2019 and ending December 31, 2022). (A940-41.) Although it is anticipated that *Harry Potter* will play during some or all of that term, the lease is not contingent on and does not require the staging of *Harry Potter*. (A943.) Because Curran Live would largely cease operations during the term of the lease, ATG agreed to hire certain Curran Live personnel during the lease. (A950.)

Harry Potter's producers, including Sonia Friedman and her production company (Sonia Friedman Productions), decided where their show would be staged, and no Appellee invested in, obtained any right of first presentation to or became a producer of *Harry Potter*. (B567-68; B618-19; B586-87; B633, 639.) As with *DEH*, SHN tried to convince Ms. Friedman—not the Hayses—to present her show in an SHN theater. (B84; B87; B332.) Ms. Friedman told SHN why she chose the Curran: "We've been offered a venue and a strategy that fits our show perfectly." (B443; *see also* B533.) Again, the producer decided where the show would play.

Contrary to NSF's assertions on this appeal that "[t]he Hayses negotiated for and obtained the legal right to stage" *Harry Potter* (NSF Br. 42), Appellees have no contractual arrangement with *Harry Potter*'s producers to book

that show at the Curran (B626). In fact, Appellees have not seen, and are not privy to the terms of, ATG's agreement with *Harry Potter*'s producers. (B587; B639; B626.)

2. The Court of Chancery Ruled that Appellees Do Not Control *DEH* or *Harry Potter*.

After considering the evidence presented about *DEH* and *Harry Potter*, including the booking contracts and arrangements, the trial court ruled that Appellees do not "control . . . where [either] Production plays and the terms and conditions of said engagement," as Section 7.02(b) requires. (PI Opinion 34.) The court ruled that the requisite control does not exist because "Defendants had no independent right or authority to cause *DEH* or *Harry Potter* to play at the Curran or to set the terms for either play." (PI Opinion 34.) NSF does not appeal the trial court's factual findings, which are amply supported by the evidence.

3. The Court of Chancery Rejected NSF's Unreasonable Interpretation of the LLC Agreement.

Because there is no evidence that any Appellee in fact controls either *DEH* or *Harry Potter*, NSF sought to avoid the facts by "argu[ing] that any exercise of the Hays's ownership of the Curran" (other than "a long-term, passive lease with no influence over programming") is "equal to control." (PI Opinion 23.) NSF asserted that "simply because [Mrs.] Hays' affiliate owns the Curran" and she is thus entitled to decline a producer's request to use the Curran, when Mrs. Hays

"agree[s]" to allow a production to "play at the Curran," she has "'control' as defined in Section 7.03." (PI Opinion 29-30; *see also* A1232 (NSF November 8, 2018 Prelim. Inj. Reply 14).) The court rejected that argument, holding that, under the "unambiguous" language of Section 7.02(b), ownership of the theater is not equivalent to control over productions staged there. (PI Opinion 31, 34.)

The court noted that NSF's proposed interpretation of "control" was "not reasonable," in part because it would render the word "control" in Section 7.02(b) "unnecessary surplusage" because that provision would be triggered any time the owner agreed to "stage" any Production, regardless of the required "control." (PI Opinion 31, 34.) The court also ruled that NSF's interpretation of Section 7.02(b) was inconsistent with Section 7.06: "Section 7.06 lays out a series of ways that members, affiliates, directors, and officers may compete against the Company, with a narrow circumstance where they may not" set forth in Section 7.02(b). (PI Opinion 32.) Under NSF's interpretation, however, Section 7.06 would allow competition only where "the member or affiliate is a passive, uninvolved investor" in a theater. (PI Opinion 32.) This reading, the trial court ruled, would therefore "make large parts of Section 7.06" meaningless, including the part that expressly permits Members and their Affiliates to engage in "ownership, operation and management of businesses and activities, for its own account and for the account of others." (PI Opinion 32-33.)

L. The Consolidated Appeals

On December 3, 2018, NSF filed a Notice of Appeal in the first action. The next day, CSH Theatres, CSH Curran, Carole Hays and Dr. Jeffrey Hays filed a cross appeal. One week later, NSF moved in the second action for entry of partial final judgment under Court of Chancery Rule 54(b), or, alternatively, for certification of an interlocutory appeal. On December 21, 2018, the trial court entered partial final judgment. On January 9, 2019, this Court consolidated the two appeals and set a joint briefing schedule. (B662 (January 9, 2019 Order ¶¶ 7-8).)

ARGUMENT

I. NSF ABANDONED ITS SECTION 7.02(a) CLAIMS, WHICH ARE MERITLESS IN ANY EVENT

A. Questions Presented

Whether NSF abandoned its claim under Section 7.02(a) and, if not, whether the trial court properly determined that Sections 7.06 and 7.02(b) of the LLC Agreement permit competition with SHN, notwithstanding Section 7.02(a).

B. Scope of Review

Contrary to NSF's assertion, this Court's review of the decision in the first action is not purely *de novo*. While this Court "consider[s] issues involving the language of the contract *de novo*," *Textron Inc.* v. *Acument Glob. Techs., Inc.*, 108 A.3d 1208, 1218 (Del. 2015), it "must accept the factual findings made by the trial judge if those findings are supported by the record and are the product of an orderly and logical deductive process," *New Castle Cty.* v. *Disabatino*, 781 A.2d 687, 690 (Del. 2001).

C. Merits of the Argument

1. NSF Abandoned Any Claim that Section 7.02(a) Bars Competition.

NSF argues—for the first time on appeal—that Section 7.02(a) of the LLC Agreement prohibits any "competitive conduct at the Curran" by imposing a "contractual and fiduciary duty of loyalty" on SHN's Members and Affiliates. (NSF Br. 24.) Because Robert Nederlander expressly contradicted this assertion at

trial, and NSF abandoned it post-trial, "this Court may not address the issue in this appeal." *Evans* v. *State*, 1992 WL 276392, at *1 (Del. Sept. 11, 1992); *see also Del. Elec. Coop.* v. *Duphily*, 703 A.2d 1202, 1206 (Del. 1997) ("It is a basic tenet of appellate practice that an appellate court reviews only matters considered in the first instance by a trial court.").

Robert Nederlander—the "Nederlander" in Nederlander of San Francisco—unequivocally testified that Section 7.02(a) applies to "just NSF" "on the Nederlander side" (B283 (Tr. 927:17-21 (Nederlander)); *see* p. 19, *supra*), and that NSF's Permitted Transferees "didn't have to" "devote[] their efforts to maximizing the success of SHN" (B282 (Tr. 926:7-10 (Nederlander))).

Mr. Nederlander thus rejected and abandoned the very theory his lawyers advance here, which constitutes a waiver. Just last month, this Court held that a party's "new" argument on appeal about rights conferred in an LLC agreement is waived where the party's principal had disclaimed the argument in sworn testimony, "acknowledg[ing] that there was no such right . . . in the LLC Agreement." *Oxbow Carbon & Minerals Holdings* v. *Crestview-Oxbow Acquisition*, 2019 WL 237360, at *20 (Del. Jan. 17, 2019) ("declin[ing] to reach [the] merits" of argument because it "was not fairly presented below"). Mr. Nederlander's testimony is equally dispositive, defeating NSF's Section 7.02(a) theory. *See* pp. 18-20, *supra*.

Far from preserving this issue, NSF expressly abandoned any Section 7.02(a) claim post-trial. NSF's post-trial opening brief asked the court to "enjoin the Hays Group from competing with SHN . . . pursuant to *Section 7.02(b)* of the LLC Agreement"—not Section 7.02(a). (A760 (NSF January 19, 2018 Post-Trial Opening Brief 6) (emphasis supplied).) NSF's reply brief confirmed that its competition claim "*has always been* a claim that the Hays Group's improper competition violates its duties of loyalty and *Section 7.02(b)*"—again, not Section 7.02(a). (A894 (NSF March 2, 2018 Post-Trial Reply Brief 41) (emphases supplied).) Moreover, at oral argument, NSF's lawyer unambiguously conceded that, in light of Mr. Nederlander's testimony, the "Section 7.02(a) Duty to Maximize the Success of SHN Applies to Members, Not Affiliates." (B431.) NSF strategically chose to disclaim reliance on Section 7.02(a) and instead argued that "Shorenstein Entity" and "Nederlander Entity" mean different things in Section 7.02(a) and 7.02(b), explaining at the April 3, 2018 post-trial argument that ***only*** Section 7.02(b) was intended "to reach permitted transferees." (B438.) NSF may not revisit that choice here.

Beyond waiver and abandonment, NSF did not preserve its Section 7.02(a) argument. The portions of the record NSF cites (NSF Br. 23) bear no resemblance to NSF's argument before this Court. Specifically, NSF cites four pages in total of its *pre-trial* briefs that (i) are part of a background section with no

argument (A546, A549); or (ii) argue generally that Affiliates are bound by Section 7.02 (A615-16). These references are irrelevant in any event, because "an issue not raised in post-trial briefing has been waived, even if it was properly raised pre-trial." *Oxbow Carbon*, 2019 WL 237360, at *15 n.77. NSF mentioned Section 7.02(a) only by fleetingly paraphrasing its terms in NSF's post-trial opening brief (A785, A810), but never argued that that provision barred competition and thus never "squarely address[ed] th[e] question in the context of a distinct issue." *Clark* v. *Clark*, 47 A.3d 513, 518 (Del. 2012); *see also Seaport Vill. Ltd.* v. *Terramar Retail Ctrs.*, 2016 WL 5373085, at *1 & n.1 (Del. Sept. 26, 2016) (argument waived where it was "mentioned in a cursory manner in defendant's Post-Trial Brief").[15] The issue therefore was never preserved.

2. Section 7.02(a) Does Not Bar Competitive Ventures that the LLC Agreement Expressly Permits.

NSF's claim that Section 7.02(a) prohibits "competitive conduct" is, in any event, entirely baseless.[16] (NSF Br. 23.) Section 7.02(a) says nothing about

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[15] In the two-page section of its post-trial opening brief entitled "The Hays Group's Improper Competition Breached the LLC Agreement," NSF argued exclusively that Section 7.02***(b)*** had been breached. (A814 (NSF January 19, 2018 Post-Trial Opening Brief 60).)

[16] The trial court's unchallenged factual findings refute NSF's assertion of "harm[]" from "competitive conduct at the Curran." (NSF Br. 26, 28-29.) In fact, NSF never proved any "higher costs for SHN to secure a production" (NSF Br. 29), or that SHN suffered any damages whatsoever (Trial Opinion 88-89). *See* pp. 27, 29, *supra*.

competition. Rather, it states only that (i) the Shorenstein Entity and Nederlander Entity "agree to devote their efforts to maximize the economic success of the Company" and "avoid any conflicts of interests between the Members," and (ii) "[a]ll actions of the Members and their representatives with regard to the Company and theater matters will be carried out in good faith and in a prompt and expeditious manner."

By contrast, Section 7.06 expressly allows competition, permitting "any Member, any Affiliate of any Member or any officer or director"—including Appellees—to have "business interests and engage in business activities in addition to those relating to the Company." (A305.) NSF emphasizes that Section 7.06 is "subject to" Section 7.02. (NSF Br. 30-34.) But as the trial court correctly recognized, the only applicable *competition* limitation appears in Section 7.02(b), which governs productions "control[led]" by the Members.[17] Thus, under "familiar and well-settled rules of construction," the "specific language" allowing competition in Section 7.06 and Section 7.02(b) "controls over any general

[17] If Section 7.02(a) broadly prohibited competition, it would conflict with this narrower limitation, rendering Section 7.02(b) surplusage.

language" in Section 7.02(a) about efforts, conflicts or good faith. *Wood* v. *Coastal States Gas Corp.*, 401 A.2d 932, 941 (Del. 1979).[18]

In *Brinckerhoff* v. *Enbridge Energy*, 159 A.3d 242 (Del. 2017), minority owners of a limited partnership alleged that the general partner had breached the partnership agreement by overpaying for property. Like the LLC Agreement here, the partnership agreement in *Brinckerhoff* contained both a general provision (defining the general partner's standard of care) and a specific provision (governing property transactions). *Id*. at 253-54. Recognizing that courts interpreting a contract must "prefer specific provisions over more general ones," this Court applied the property-related provision, not the general standard of care. *Id.* at 254. The same principle applies here. Section 7.06 specifically permits competition, subject to Section 7.02(b)'s limited exceptions, whereas Section 7.02(a)—which says nothing about outside activities—provides at most a

[18] NSF asserts that the phrase "subject to" limits the scope of Section 7.06, such that the "balance of Article VII, when inconsistent with Section 7.06, must subordinate or 'trump' that Section." (NSF Br. 31.) But Section 7.06 could only be "trumped" by another provision specifically addressing competition, such as Section 7.02(b), not by a general provision such as Section 7.02(a). The cases on which NSF relies are thus irrelevant. *Cf. Penn Mut. Life Ins.* v. *Oglesby*, 695 A.2d 1146, 1147, 1150 (Del. 1997) ("general" provision denying coverage was "subject to," inconsistent with, and thus trumped by specific provisions permitting coverage); *Supermex Trading Co.* v. *Strategic Sols. Grp.*, 1998 WL 229530, at *5 (Del. Ch. May 1, 1998) (provision giving option to pay in stock or cash was "subject to," inconsistent with, and thus "trumped" by specific provision that "by itself [required] the Company to redeem for cash").

general standard of care for Members. Thus, the specific language in Section 7.06 is "not displaced by other general provisions." *Id.* at 255-56.

Moreover, NSF's attempt to read a duty of "best efforts" into Section 7.02(a) (NSF Br. 25) is misguided. Section 7.02(a) says nothing about "best efforts"—merely that the parties "devote their efforts to maximize the economic success" of SHN.[19] NSF's argument that the clause requiring "[a]ll actions of the Members and their representatives with regard to the Company" to "be carried out in good faith and in a prompt and expeditious manner" imposes a "contractual" duty of loyalty upon "the parties" is likewise unavailing. (NSF Br. 24.) Section 7.02(a)'s "good faith" obligation applies on its face to the "Members and their

[19] NSF relies on two inapposite corporate merger cases where the parties agreed to make "commercially reasonable efforts" to consummate the mergers. In neither case did those terms restrict outside competitive ventures. *Williams Cos.* v. *Energy Transfer Equity*, 159 A.3d 264 (Del. 2017); *Narrowstep, Inc.* v. *Onstream Media Corp.*, 2010 WL 5422405 (Del. Ch. Dec. 22, 2010). The other case on which NSF relies—*Pegasystems* v. *Carreker*—is similarly unavailing. There, a joint venture agreement required "both parties [to] refrain from any development activities or alliances which would create competing products." 2001 WL 1192208, at *3 (Del. Ch. Oct. 3, 2001). Here, Section 7.02(a) does not prohibit competition, and Section 7.06 expressly permits Appellees to compete.

representatives"—*not* the Members' Affiliates—and only in respect of actions taken "with regard to" SHN, not in some other capacity.[20]

3. NSF Proved No Violation of Section 7.02(a) in Any Event.

In any event, there was no evidence that Appellees violated Section 7.02(a).

First, as NSF expressly conceded after trial in the first case, the "Section 7.02(a) Duty to Maximize the Success of SHN Applies to Members, Not Affiliates" (B431)—and there was no evidence that CSH Theatres (the Member) has done anything but devote itself to maximizing SHN's economic success. CSH Theatres does not compete with SHN at all. It has filled its Board and Co-President positions at SHN, and the evidence shows that SHN has made more money since the Curran lease expired than it ever did before. (B173, 176-78 (Tr. 157:3-5, 168:10-170:12 (Holland)); B93.)

[20] NSF's reliance on *Norton* v. *K-Sea Transp. Partners*, 67 A.3d 354 (Del. 2013) to argue that Section 7.02(a) creates a duty of loyalty precluding competition is misplaced. The *Norton* Court did not hold that the "standard of 'good faith'" in the partnership agreement in that case precluded any competition by the partners. *Mesirov* v. *Enbridge Energy* is equally unavailing. The court there noted that a specific provision in a partnership agreement governing a transaction applied over a general good faith provision. 2018 WL 4182204, at *4-6 (Del. Ch. Aug. 29, 2018).

Second, Appellees fully discharged any duty purportedly imposed by Section 7.02(a). Under settled law, "presentation of a purported corporate opportunity to a board of directors, and the board's refusal thereof, creates a safe harbor" for anyone subject to a fiduciary duty of loyalty. *Telxon Corp.* v. *Meyerson*, 802 A.2d 257, 263 (Del. 2002). That is precisely what happened with respect to the Curran. All agree that SHN had opportunities to purchase and lease the Curran, but Robert Nederlander rejected both because he thought the asking price was too high.[21] (Trial Opinion 13; NSF Br. 13.)

Third, as the trial court found—and NSF does not challenge—Mr. Nederlander consented unconditionally to CSH Curran's purchase of the Curran, and nothing about the failed lease negotiations was improper or created a conflict of interest. (Trial Opinion 46-48, 60-61.) After consenting to the theater purchase, and declining to accept a lease "proposal [that] was still at or below market rent" (Trial Opinion 61), NSF cannot now contend that Mrs. Hays is prohibited from putting the theater to productive use. Mr. Nederlander consented to her doing so.

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[21] Cases on which NSF relies support the conclusion that any purported duty of loyalty was discharged here. In *Thorpe by Castleman* v. *CERBCO*, this Court explained that directors may compete with their company "after informing [it] of [an] opportunity." 676 A.2d 436, 442 (Del. 1996). Likewise, *Guth* v. *Loft* merely stands for the proposition that a director must offer a corporate opportunity "to his corporation" in the first instance. 5 A.2d 503, 513 (Del. 1939).

Fourth, NSF failed altogether to prove another necessary element of any breach of contract claim: damages. *Connelly* v. *State Farm Mut. Ins.*, 135 A.3d 1271, 1279 (Del. 2016). The trial court found that NSF had "not provided the Court with *any* information about the harm caused to the Company by," *inter alia*, "the booking of shows into the Curran." (Trial Opinion 88.) This unchallenged finding alone dooms any claim of error under Section 7.02(a).

II. THE COURT OF CHANCERY CORRECTLY REJECTED NSF'S SECTION 7.02(b) CLAIMS IN THE SECOND ACTION

A. Question Presented

Whether the trial court properly rejected NSF's claims that staging *DEH* and *Harry Potter* at the Curran would breach Section 7.02(b), where there was no evidence that CSH Theatres or any other Appellee "controlled" those productions.

B. Scope of Review

As with NSF's first issue on appeal, this Court's review is not *de novo*. Rather, this Court must defer to the trial court's findings of fact, including "findings of historical fact that are based on physical or documentary evidence or inferences from other facts," unless clearly erroneous. *CDX Holdings* v. *Fox*, 141 A.3d 1037, 1041 (Del. 2016). NSF has come nowhere close to demonstrating that any such error occurred.

C. Merits of the Argument

NSF's claim that Appellees' ownership or operation of the Curran violated Section 7.02(b) was twice rejected by the Court of Chancery. Even though the trial court ruled consistently on the law and on the facts in both cases below, NSF appeals the Section 7.02(b) judgment *only* as to the second action, and only in respect of an erroneous mischaracterization of the Court of Chancery's

ruling. The trial court's rulings on the facts and the law in both cases defeat NSF's appeal.

1. The Court of Chancery's Unchallenged Factual Findings That Appellees Did Not Control *DEH* or *Harry Potter* Require Affirmance.

All parties agree that Section 7.02(b) restricts the "Nederlander Entity" and the "Shorenstein Entity" from staging productions they "control[]" within 100 miles of San Francisco. Similarly, all agree that "control" exists only where an Entity has "the ability to determine where the Production plays and the terms and conditions of said engagement." (Trial Opinion 71.) Thus, the relevant "control" for purposes of Section 7.02(b) is control over a production—*i.e.*, the show itself—not control over the theater.

In the second action, the trial court properly held—on an extensive record—that Appellees had no such "control" over *DEH* or *Harry Potter*. As the court determined, no Appellee "had any preexisting rights to force *DEH* or *Harry Potter* to play at the Curran." (PI Opinion 29.) Instead, "all the terms and conditions" of those engagements arose from "negotiations that occurred simply because [Carole] Hays's affiliate owns the Curran and she had the ability to say no to a request . . . that she did not find agreeable." (PI Opinion 29.) As the court found, this does not mean Mrs. Hays or anyone affiliated with her had the relevant control of *DEH* or *Harry Potter* under Section 7.02(b). (PI Opinion 30, 34.)

Rather, the trial court held that the producers of *DEH* and *Harry Potter*—not Appellees—have (and exercised) "the ability to determine where [either] Production plays and the terms and conditions of said engagement." (A305 (LLC Agreement § 7.03).) The court found that "the producers of *DEH* and *Harry Potter* openly negotiated with multiple venues," including SHN's theatres, which "competed against each other to hold the productions." (PI Opinion 33.) In both cases, the producers decided where their shows would play. (PI Opinion 33-34; *see also* pp. 31-35, *supra*.) On these unchallenged facts alone, this Court should affirm the trial court's decision rejecting NSF's claims in the second action.

2. The Court of Chancery Considered and Rejected NSF's Arguments About "Control" under Section 7.02(b).

Seeking to avoid the trial court's factual findings that no Appellee had "control" over *DEH* or *Harry Potter*, NSF insists that the court "mischaracterized" or "misunderstood" its claim. (NSF Br. 37-41.) Not so. The trial court squarely considered—and rejected—NSF's tortured arguments regarding "control" under Section 7.02(b).

First, NSF's assertions that the trial court "mischaracterized" its argument as a "categorical" theory of control (NSF Br. 37-38) or failed to perform the "highly fact dependent" assessment of *DEH* and *Harry Potter* (NSF Br. 39) are simply false. The court began its Opinion by holding that NSF's claims were not

barred by *res judicata* precisely because NSF's theory was that "the terms of the contract" for each show, "and not the simple act of the play showing, give rise to Plaintiff's claims." (PI Opinion 19.) The trial court then proceeded to "evaluate Plaintiff's contention that the circumstances surrounding the production of *DEH* and *Harry Potter* evidence control." (PI Opinion 28.) The court examined all of "the terms of the contracts regarding the productions of *DEH* and *Harry Potter*" (PI Opinion 28), and ruled—in fact findings that NSF does *not* challenge on appeal—that these terms are not "sufficient to make the productions subject to Defendants' 'control' as defined in Section 7.03" (PI Opinion 30).

Second, NSF's assertion that it "never argued that *any* 'staging,' *per se* and without more, constitutes control" (NSF Br. 41) is blatantly false. In fact, NSF argued in its brief that "the making of an agreement between a theater operator and producer . . . provides them *both* with control over the engagement." (A1224 (NSF November 8, 2018 Prelim. Inj. Reply 14) (emphasis in original).)[22] This argument led the trial court to characterize NSF's theory as a claim that "staging—*i.e.*, presenting—a play equals control." (PI Opinion 22.) Far from

[22] *See also* A1095 (NSF October 29, 2018 Opening Prelim. Inj. Brief 35) ("[T]heater owners/operators can and generally do exercise control over where a production plays and over the terms of the production through a variety of negotiation points and deal provisions."); A1226 (NSF November 8, 2018 Prelim. Inj. Reply 16) ("Defendants obtained control over the productions when they reached an agreement with the producers.").)

misunderstanding NSF, the court addressed the very arguments NSF presented. NSF even presses the same argument in its Opening Brief here, arguing that "control" arises from "negotiat[ing] for and obtain[ing] the legal right to stage th[e] shows at the Curran." (NSF Br. 42.) In other words, NSF itself contends that the owner of the theater, by making a presentment agreement with the producer, necessarily gains the requisite "control."[23]

Third, in its trial court motion seeking an immediate appeal, NSF admitted that the court "found that Defendants did not control *DEH* and *Harry Potter* as 'control' is defined under the LLC Agreement." (B650 ¶ 18.) By asking the trial court to convert its preliminary injunction decision into a final judgment *without any trial* (B645-46 ¶¶ 7-8), NSF conceded that its case failed on the facts and the law, not on some supposed misunderstanding of its theory at the preliminary injunction stage.

Fourth, the trial court correctly recognized that NSF's interpretation of Section 7.02(b) would render the term "control" meaningless. (PI Opinion 29-

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[23] One of the cases on which NSF relies—*Basho Technologies Holdco B* v. *Georgetown Basho Investors*—demonstrates the lack of control over *DEH* and *Harry Potter* here. In that case, a minority stockholder was found to have control over a company for purposes of certain financing transactions based on preexisting contractual rights it had as a lender to the company, rights to appoint company board members and other evidence of influence over the company's management. 2018 WL 3326693, at *26-28 (Del. Ch. July 6, 2018). There is no evidence that Mrs. Hays or any Affiliate had any such control over *DEH* or *Harry Potter*.

31.) On appeal, NSF argues that Appellees obtained "joint control over *DEH* and *Harry Potter*" by "negotiat[ing] contracts with the producers that gave them significant influence over both Productions." (NSF Br. 39-40.) But such a "negotiation" (and agreement) with the producer is always necessary unless the owner/operator already has a preexisting right to stage the production. Here, as the trial court recognized, the parties added the term "control" in Section 7.02(b) of the LLC Agreement, a term the predecessor 1992 partnership agreement did not include. (Trial Opinion 77.) The trial court correctly gave meaning to that term.

Finally, contrary to NSF's current assertions, the trial court's rulings as to *DEH* and *Harry Potter* are fully consistent with its ruling as to *Fun Home*, the production that it found in the first case Mrs. Hays "controlled."[24] (Trial Opinion 73.) As the trial court noted, Mrs. Hays obtained a "right of first refusal" for *Fun Home*. (PI Opinion 33.) This arrangement "created a situation where the producers of *Fun Home* would have breached their contract by playing elsewhere." (*Id*.) Not so with *DEH* or *Harry Potter*. The undisputed evidence shows that SHN competed for both plays and that the producers alone chose the Curran in preference to an SHN theatre. Thus, contrary to NSF's assertions, the trial court's

[24] NSF's assertion of "inconsistencies" is in any event irrelevant because the finding of "control" over *Fun Home* was "unnecessary . . . to decide [the] issue," and thus dictum "without precedential effect." *Crown EMAK Partners* v. *Kurz*, 992 A.2d 377, 398 (Del. 2010).

two rulings are completely consistent. No Appellee "controlled" *DEH* or *Harry Potter*.

III. SECTION 7.02 OF THE LLC AGREEMENT DOES NOT APPLY TO THE AFFILIATES OF THE SHN MEMBER

A. Question Presented on the Cross-Appeal

Whether the phrases "Shorenstein Entity" and "Nederlander Entity," as used in Section 7.02 of the LLC Agreement, refer not just to the actual SHN Members, but also to their "Permitted Transferees" and "Affiliates" who have no Membership Interest in SHN and have never agreed to be bound by the LLC Agreement. (B406-12 (CSH January 19, 2018 Post-Trial Opening Brief 55-61); Trial Opinion 66-68, 74-78.)

B. Scope of Review

This Court reviews the interpretation of an LLC agreement *de novo*. *Heartland Payment Sys.* v. *Inteam Assocs.*, 171 A.3d 544, 557 (Del. 2017). Factual findings with respect to extrinsic evidence "are entitled to deference 'unless the findings are not supported by the record or unless the inferences drawn from those findings are not the product of an orderly or logical deductive process.'" *Textron*, 108 A.3d at 1218-19 (quoting *Honeywell Int'l* v. *Air Prods. & Chems.*, 872 A.2d 944, 950 (Del. 2005)).

C. Merits of the Argument on the Cross-Appeal

All of NSF's claims under Section 7.02 of the LLC Agreement, as well as its arguments on appeal, must fail if this Court overturns the trial court's erroneous conclusion that the term "Shorenstein Entity" means not only the SHN

Member and party to the contract on the Hays side (CSH Theatres), but also its non-party Affiliates and Permitted Transferees. The trial court's interpretation violates the basic principle that only parties are bound by a contract, as well as fundamental canons of contract interpretation. The court's interpretation in this respect is also at odds with the extrinsic evidence. As Robert Nederlander himself admitted at trial, Section 7.02 does not restrict the activity of non-parties—a fact confirmed by the drafting history of Section 7.02 and the parties' pre-litigation conduct.

1. By Their Plain Terms, "Shorenstein Entity" and "Nederlander Entity"—Not All of Their Affiliates—Are SHN's Members.

"Delaware adheres to the 'objective' theory of contracts," whereby "a contract's construction should be that which would be understood by an objective, reasonable third party." *Osborn* v. *Kemp*, 991 A.2d 1153, 1159 (Del. 2010). When a contract is "clear and unambiguous," this Court "will give effect to the plain-meaning of the contract's terms and provisions." *Id.* at 1159-60. Here, the clear and unambiguous terms of Section 7.02 bind only the two Members of SHN: CSH Theatres and NSF. The trial court erred in holding otherwise.

First, as a general principle of contract law, "only the formal parties to a contract are bound by its terms." *McWane, Inc.* v. *Lanier*, 2015 WL 399582, at *7 (Del. Ch. Jan. 30, 2015), *aff'd*, 2009 WL 1740171 (Del. June 18, 2009). The

only two parties to the LLC Agreement are CSH Theatres and NSF, and the agreement is "between" only those two, "as Members." (A285, 289, 321; NSF Br. 1.) While the LLC Agreement refers to "Permitted Transferees" and "additional Person[s] . . . admitted to the Company" when defining "Shorenstein Entity," "Nederlander Entity" and "Members," these references merely recognize that other parties *might* one day become Members of SHN and parties to the contract. (A285, 287.) That has never occurred. Thus, because only CSH Theatres and NSF entered into the LLC Agreement, that contract could not have bound either Member's Affiliates—much less future Affiliates, such as CSH Curran, formed years later. *See Ellington* v. *EMI Music*, 21 N.E.3d 1000, 1004 (N.Y. 2014) ("Absent explicit language demonstrating the parties' intent to bind future affiliates . . . the term 'affiliate' includes only those affiliates in existence at the time that the contract was executed.").

Second, the trial court's interpretation also violates the canon that "a contract must be read as a whole and in a manner that will avoid any internal inconsistencies, if possible." *Bank of N.Y. Mellon* v. *Commerzbank Capital Funding Trust II*, 65 A.3d 539, 550 (Del. 2013). "Shorenstein Entity" and "Nederlander Entity" are used throughout the LLC Agreement to mean the two

SHN Members.[25] Indeed, the "Members" are by definition the "Entities." (A287.) But because a Permitted Transferee includes "an Affiliate of *any* Member" (A288 (emphasis supplied)), the trial court's ruling means that all Affiliates of *either* NSF or CSH Theatres are *both* a Shorenstein Entity and a Nederlander Entity. The ruling thus creates, rather than avoids, inconsistencies.

Third, reading "Shorenstein Entity" to include Affiliates of CSH Theatres would "render . . . part[s] of the contract mere surplusage." *Kuhn Constr.* v. *Diamond State Port Corp.*, 990 A.2d 393, 397 (Del. 2010). For example, Section 7.03 requires "'most favored nation' treatment" for productions controlled by "the Shorenstein Entity or the Nederlander Entity *or any Affiliate* thereof." (A305 (emphasis supplied).) But under the trial court's reading, "Shorenstein Entity" already includes Affiliates, rendering use of that term in Section 7.03 unnecessary. Additionally, if the "Entities" and "Members" included all "Permitted Transferees," virtually every reference to "Affiliates" would be

[25] For example, the LLC Agreement says that the "Shorenstein Entity and the Nederlander Entity are the general partners" of SHN's predecessor partnership (A285), and there was no dispute that those partners were CSH Theatres and NSF alone. Moreover, the "Shorenstein Entity" is referred to exclusively in the singular, and is used only to mean the entity originally managed by Walter Shorenstein. (A309 § 9.02.)

redundant.[26] Likewise, the provision that "each Member shall be entitled to sell, assign, transfer or convey its Membership Interest to . . . a Permitted Transferee of such Member" (A310 (LLC Agreement § 10.02)) would be pointless because Permitted Transferees would already be Members.

Fourth, the trial court's interpretation yields "absurd" results. *Osborn*, 991 A.2d at 1160. By deeming all Permitted Transferees part of the "Entities," each hypothetical Transferee (including all Affiliates) would enjoy an immediate right to appoint two board members and a co-president (A291-92 (LLC Agreement §§ 4.01(c), 4.02(a))), as well as "receive distributions from the Company" and "vote and participate in [Company] management" (A287 (LLC Agreement 3)). None of this, of course, has ever happened in SHN's history.

The trial court recognized that its interpretation "may well" lead to absurdity, but it dismissed these consequences because "[t]he drafters of the LLC Agreement used 'Members' in certain provisions, and 'the Shorenstein Entity and the Nederlander Entity' in other provisions, which suggests the terms mean

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[26] A295 (LLC Agreement § 4.04(l)) (agreements "with any Member or an Affiliate"); A298 (§ 5.04) ("None of the Members nor any Affiliate" must guarantee loans); A305 (§ 7.06) ("any Member [or] any Affiliate . . . may have business interests and engage in business activities in addition to those relating to the Company"); A306 (§ 7.07(d)) (indemnification "of a Member or of an Affiliate"); A307-08 (§ 7.09) (information relating to "Members or their Affiliates"); A309 (§ 9.03) (indemnify "each other Member[and] its Affiliates").

different things." (Trial Opinion 74-75.) However, "[i]n giving sensible life to a real-world contract, courts must read the specific provisions of the contract in light of the entire contract." *Chi. Bridge & Iron Co.* v. *Westinghouse Elec. Co.*, 166 A.3d 912, 913-14 (Del. 2017). At such time, if ever, that SHN has new or different Members that are not Permitted Transferees, the Shorenstein Entity and Member may indeed "mean different things." Until then, the only interpretation of the LLC Agreement that gives consistent effect to all its provisions is that "Shorenstein Entity" means CSH Theatres.

2. The Extrinsic Evidence Proves that Section 7.02 Applies to Members Only.

Where a contractual provision is susceptible to two reasonable interpretations, "a court may consider evidence of prior agreements and communications of the parties as well as trade usage or course of dealing." *Eagle Indus., Inc.* v. *DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1233 (Del. 1997). Here, even if the meaning of "Shorenstein Entity" in Section 7.02 were ambiguous, the parties' prior agreements and course of dealing confirm that Section 7.02 does not bind Members' Affiliates.

First, Robert Nederlander—the only living signatory to the LLC Agreement—testified that "Nederlander Entity" as used in Section 7.02 "absolutely" refers to "just NSF" on the Nederlander side. (B282-83 (Tr. 926:18-927:21 (Nederlander)).) He also confirmed that Section 7.02's obligations do not

apply to "Permitted Transferees" on the Nederlander side. (*See* pp. 18-20, *supra*.) The trial court erred in ignoring these concessions by NSF through the *only* trial witness who negotiated and executed the contract. *Textron*, 108 A.3d at 1223 ("'Where the parties have attached the same meaning to a promise or agreement or term thereof, it is interpreted in accordance with that meaning.'" (quoting RESTATEMENT (SECOND) OF CONTRACTS § 201)).

Second, the drafting history of Section 7.02(b) confirms that "Shorenstein Entity" and "Nederlander Entity" refer only to the Members. According to Robert Nederlander, the obligations in Section 7.02 were carried forward "identically" from Section 4 of the 1992 partnership agreement, which applied only to the parties—*i.e.*, the general partner entities later converted into NSF and CSH Theatres. (*See* pp. 12, 18, *supra*.) While the trial court considered the 1992 partnership agreement, it focused on that contract's supposed failure to define the term "partner" (Trial Opinion 77 n.288)—overlooking the fact that the partners were the exact parties that executed the agreement.[27]

Third, the Nederlanders' pre-litigation conduct also demonstrates that "Shorenstein Entity" and "Nederlander Entity" do not mean all Affiliates of the

[27] The trial court's misinterpretation also rested on its misperception that Jimmy Nederlander "was no longer affiliated with NSF Associates" after 1992. (Trial Opinion 77.) In fact, he was one of NSF's two general partners. (B68.)

Members and the families controlling them. *See Sun-Times Media Grp., Inc.* v. *Black*, 954 A.2d 380, 398 (Del. 2008) ("course of performance" evidence "is given great weight in the interpretation of the agreement"). As the trial court found, a "Nederlander Affiliate" "runs Broadway San Jose," "which stages Broadway-style productions . . . less than 100 miles from San Francisco." (Trial Opinion 7, 78.) While the Nederlander side "made offers to the Company to participate in some, but not all, individual shows" (Trial Opinion 78), there was no evidence of compliance with Section 7.02(b) for *any* Broadway San José show—much less *every* such show, as NSF contended that Section 7.02(b) requires.[28] This reflects NSF's understanding that Section 7.02(b) does not bind its San José Affiliate—or Affiliates and Permitted Transferees, generally. *Sun-Times*, 954 A.3d at 398 n.71 ("'The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning.'" (quoting RESTATEMENT (SECOND) OF CONTRACTS § 202, cmt. g.)).

Accordingly, on the cross-appeal, this Court should reverse the declaratory judgment that "Shorenstein Entity" means CSH Theatres and its Affiliates and clarify that "Shorenstein Entity" means CSH Theatres and any Permitted Transferee to which CSH Theatres actually conveys a Membership

[28] Nor does NSF assert that its Permitted Transferees ever honored Section 7.02(a)'s purported outright ban on competition.

Interest. Doing so will prevent NSF from hereafter attempting to use the LLC Agreement as a sword to try to interfere with the Curran's operations as an independent theater every time a new production is staged there.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's declaratory judgment interpreting the LLC Agreement to bind Affiliates of CSH Theatres, dismiss NSF's appeal and otherwise affirm the trial court's rulings.

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